# Only a Court Established by Law Can Be an Independent Court

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In the preliminary ruling delivered on 19 November 2019 in Joined Cases C-585/18, C-624/18 and 625/18, *A.K. and others*, the European Court of Justice established a detailed method for assessing the independence (or lack thereof) of courts. The judicial independence test laid down by the ECJ, however, may not be entirely fit for the purpose of assessing the lawfulness of courts and judges which are established and appointed on the basis of flawed procedures by bodies arguably violating basic judicial independence requirements as established in EU law. The ECJ appears to limit the required verification under EU law to the issue of independence only. Instead, the reviewing body should, first, check whether the challenged court (judge) is "established by law" and only then, if necessary, follow up on the examination of its independence. Today, the Polish Supreme Court has the opportunity to step up and give full effect to that criterion.

## 1. Background

The references for a preliminary ruling brought by the Polish Supreme Court related to the verification of independence of the Disciplinary Chamber of that Court. It had been created and staffed in 2018, as part of the controversial and arguably unconstitutional changes introduced in the Polish judicial system to strengthen the influence of the legislative and executive bodies over the judiciary. The independence test established by the ECJ built on its previous case law and aimed in particular to enable the Supreme Court to determine whether the Disciplinary Chamber satisfies the judicial independence requirements established in EU law and, accordingly, whether it is a "court" within the meaning of EU law.

On the basis of the approach and key factors laid down in the ECJ preliminary ruling, the Supreme Court (Chamber of Labour and Social Security) already issued three rulings: one on 5 December 2019 (Case III PO 7/18) and two on 15 January 2020 (Cases III PO 8/18 and III PO 9/18). In all three of them it held that the Disciplinary Chamber of the Supreme Court, due to its lack of independence, is not a court within the meaning of EU law. The ECJ ruling was also referred to by the Supreme Court's Chamber of Extraordinary Control and Public Affairs which arguably lacks independence as well. In a resolution of 8 January 2020 (Case I NOZP 3/19), while pretending to follow the *A.K.* judgment, the Chamber attempted to limit it considerably stating that: (1) control is not possible *ex officio*, but only at the request of a party; (2) determination of the lack of independence of the National Council of the Judiciary (KRS), which has been suspended by the ENCJ in 2018 for its lack of independence, is not sufficient – it is necessary to determine the lack of independence of the specific judge nominated by the KRS.

Due to differences that have already arisen in the various compositions of the Supreme Court, on 23 January 2020 the Supreme Court, in an enlarged composition of three “old” chambers (without the two “new” chambers appointed back in 2018) is meant to resolve these inconsistencies and set a binding standard for other Polish courts in the application of the ECJ ruling. It remains unclear whether this decision will be adopted by the Supreme Court as scheduled and, if so, whether the executive and legislative bodies will comply with it, as they take a number of measures to prevent the Supreme Court from sitting or preclude implementation of the decision (e.g. groundless requests to the politically captured Constitutional Tribunal or unfounded decisions on interim measures, etc.).

## 2. The “independence test” vis-à-vis the “establishment test”

Both Article 6 (1) ECHR and Article 47 of the EU Charter indicate the “establishment by law” as the first, most preliminary requirement for a court, and the guarantee of a fair trial. The verification should therefore begin with the question: is the court established by law? If the answer is yes, it is only then that the examination continues, i.e. whether the court is independent, and then, if it is impartial. If the court is not established by law, the examination should be discontinued. Nothing else needs to be checked in that case, because there is no object of inspection anymore, since there is no court (judge). Once the latter is determined, the test should come to an end and the authority carrying out the verification could then possibly define further consequences of the act (or perhaps a non-act) of the non-court (non-judge).

For the time being, the perspective as adopted in the *A.K.* ruling suggests that it is the “independence” factor that should be assessed and qualify or disqualify a body as a court. The test specified by the ECJ starts “too late” from the point of view of the guarantees of Article 6 (1) ECHR and Article 47 of the EU Charter. When assessing the circumstances of the creation of a court or the appointment of a judge, the ECJ links them, in this ruling, with the guarantee of independence, yet it does not link them directly to the requirement that the court (judge) is to “be established by law”.

Thus, the verification of whether an authority is a court, or a person is a judge, does not begin with the very first question that should indeed be asked. That question is overlooked and the assessment focuses on the next step of examining the qualities of the court (the judge). This lowers the level of protection of the judiciary from the point of view of the rule of law, and consequently, may adversely affect the exercise of the individual right to a court.

It is fair to note, however, that the two tests are not entirely separated from each other, as the “independence test” may involve elements of the “establishment test”, e.g. related to the mode or circumstances of appointment of judges (see ECJ, *A.K.*, paras. 127 and 146). Thus, the requirements relating to the establishment test, may, to some extent, be indirectly reviewed under the independence test via control of relevant external and internal factors associated with judicial independence.

Nevertheless, the difference between the “establishment test” and the “independence test” may often be crucial. A finding that a court (a judge) is not established by law may be possible on the basis of objective criteria not directly related to the individual court (judge). In line with the established case-law of the European Court of Human Rights, the finding of a flagrant violation of law in the process of establishing the court (or appointing the judge) would be sufficient. It does not necessarily be related to the particular person. Whereas the assessment of independence, as indicated by the ECJ, is indeed construed as a more individualized concept of a verification which takes account of particular considerations related to the circumstances in which that very court was created (or judge appointed), the functioning of the body as well as its perception (appearance) in society and by the litigants. Such an assessment is by its nature more complex and difficult, and may eventually lead to differing opinions on similar situations reached by different bodies carrying out the verification.

The approach adopted so far is methodologically questionable, since it is incomplete. It allows for cases where it will not be proven that the relevant specific court, or specific unit within the relevant court, or a specific judge or group of judges are not independent, even though there may well be a violation of the “established by law” requirement.

# 3. A court “established by law”

Rooted in the very principle of the rule of law, the expression “established by law” refers not only to the legislative basis for the existence of the judicial body, but also to its composition in each case it considers (see ECtHR, *Lavents v Latvia*, paras. 82 and 114; ECtHR, *Ilatovskiy v Russia*, para. 36; General Court of the EU, *FV v Council*, para. 68). Thus the requirement to establish the “court” by law entails, in particular, the requirement that a “judge” sitting in that court, be appointed by law. The judicial bodies which are composed with the participation of unlawfully appointed persons will therefore not meet the requirement of Article 6 (1) ECHR and, consequently, Article 47 of the EU Charter.

There are two basic implications for the assessment of the legality of an individual judge or specific court stemming from the “establishment” criterion: (a) the law should determine the substantive criteria and procedure for judicial appointments, and (b) that law must indeed be strictly observed (ECtHR, *Ilatovskiy v Russia*, paras. 40-41; General Court of the EU, *FV v Council*, paras. 74-75). The requirement that the judge is lawfully appointed, eventually is meant to safeguard judicial independence from illegitimate interference of the political powers (ECtHR, *Gorguiladzé v Georgia*, para. 69; ECtHR, *Pandjikidzé v Georgia*, para. 105; General Court of the EU, *FV v Council*, para. 68). It provides a genuine basis for the independence and impartiality of the person appointed as a judge. However, in order to find that there is no “judge”, it is sufficient to conclude that he or she has not been legally appointed. There is no further need to consider his or her lack of independence or impartiality. The failure to appoint a judge in accordance with the law results in the lack of a court established by law by definition. This constitutes an autonomous breach because of the primary nature of the requirement is infringed.

The failure in this respect renders any further examination under Article 6 (1) ECHR or Article 47 of the EU Charter superfluous, since the guarantees embodied therein can no longer be met by an authority lacking the very attribute of being a court. The European Court of Human Rights held that such a body is not capable of guaranteeing a fair trial to the persons within its jurisdiction (ECtHR, *Pandjikidzé v Georgia*, para. 105; see also the Opinion of Advocate General Sharpston, *Réexamen Simpson v Council*, para. 63).

# 4. The nature and gravity of infringement – a flagrant violation of law

In the first place, it is for the domestic courts to assess whether an infringement of the law in the process of judicial appointments results in a refusal to recognize the person as a judge (ECtHR, *DMD Group A.S. v. Slovakia*, para. 61). They are better suited to interpret and apply provisions of domestic legislation. Here, the European Court of Human Rights has repeatedly invoked the threshold of a "flagrant violation" of law as the one which leads to the conclusion that the appointment of a judge does not meet the European standard and constitutes a violation of Article 6 (1) EHCR (e.g. ECtHR, *Lavents v Latvia*, para. 114; ECtHR, *DMD Group A.S. v. Slovakia*, para. 61; ECtHR, *Guðmundur Andri Ástráðsson v Iceland*, para. 100). The national court may therefore disqualify a person as a judge also for reasons which do not meet the threshold of a flagrant violation of law. It follows that the domestic body cannot consider a person appointed in flagrant breach of legal rules to be a lawful judge. In any case, the ECtHR will not be bound by the national court's appraisal. The facts established by the domestic court may be subject to the ECtHR's scrutiny and an autonomous assessment. In a chamber judgment in the case of *Ástráðsson v. Iceland* (currently pending before the Grand Chamber), the ECtHR considered the deficiencies in the appointment of a national judge to amount to a flagrant breach of law, even though the Icelandic Supreme Court classified them as irregularities that do not disqualify the judge.

The criterion of a flagrant breach of law may lack precision, yet national courts, as well as the ECtHR and the ECJ, have considerable experience in applying it. In principle, it refers to a process that is manifestly contrary to explicit legal rules. A manifest breach involves a striking discrepancy between the way in which the appointment process should have been carried out, and the actual way it had been carried out. The ECtHR also pointed to a possible intentional nature of the infringements and indicated that it takes into account whether the facts before it demonstrate that a breach was deliberate or, at a minimum, constituted a manifest disregard of the applicable national law (para. 102; the verification of intentionality of State authorities (their "true aims") was also recommended by the ECJ in the context of making legislative changes in the judicial system, see ECJ, *Commission v Poland*, paras. 80 et seq.). Invoking both the rule of law and separation of powers, the Court determined in *Ástráðsson* the need to "look behind appearances and ascertain whether a breach of the applicable national rules on the appointment of judges created a real risk that the other organs of Government, in particular the executive, exercised undue discretion undermining the integrity of the appointment process

to an extent not envisaged by the national rules in force at the material time" (para. 103).

Accordingly, the threshold of a flagrant violation means that the appointment process was flawed in a manner that would have had a substantial impact on (a) whether the process would have been completed at all – if someone was appointed; or (b) what the outcome of the process would have been – who would have been appointed. The concept of a flagrant breach of legal rules relates thus to the nature and gravity of the alleged breach (ECtHR, *Guðmundur Andri Ástráðsson v Iceland*, para. 102). It provides a rigorous category which is meant to distinguish between ordinary irregularities and the infringements so fundamental that the decision reached becomes unacceptable. A flagrant violation of law leads to the nullification of the results of the appointment procedure and denies legitimacy to the person thus appointed.

# 5. The Polish context

The criterion of lack of a court established by law resulting from a breach of law in the judges' appointment process could be argued to be as indispensable and possibly more appropriate than the independence test, to examine the controversial judicial appointments made to the Supreme Court and in particular to the two new chambers established in 2018. The "established by law" test could also be applied to the (unconstitutional) appointment to the Constitutional Tribunal of duplicate-judges, that is, persons elected to the positions previously lawfully taken.

For example, and as a kind of non-exhaustive illustration, in the selection and appointment of judges to the newly created chambers of the Supreme Court, at least the following breaches of the rules relevant for the nomination process can be identified, and it may be argued that each of them meets the threshold of a flagrant violation of law:

- the process was initiated by the act of the President of the Republic without the necessary counter-signature on the part of the Prime Minister – a requirement stemming directly from the Constitution that no ordinary legislation could have exempted and in fact did not exempt;
- submission by the KRS of its resolutions containing requests on the nomination to judicial positions to the President of the Republic before they became final, i.e., before the deadline for the interested parties to appeal them had expired;
- failure of the KRS to transfer an appeal from its resolution to the Supreme Administrative Court, which had jurisdiction to consider it;
- failure of the KRS and the President of the Republic to comply with a decision on interim measures issued by the Supreme Administrative Court that suspended the implementation of the KRS resolution pending the appeal proceedings.

The "establishment test" can also be invoked in order to evaluate judicial nominations made with the participation of the National Council of the Judiciary (KRS) after it was re-staffed in 2018, if it is determined that the election of new

judges-members was made in violation of legal rules. In the latter context it is sufficient to point to: (1) the premature termination of the four-year term of office of previous judges-members of the KRS guaranteed by the Constitution; (2) election of new judges-members of the KRS by the *Sejm*, in excess of the powers explicitly attributed to the parliamentary body by the Constitution (previously these members were elected by the peers).

In the above cases it may be superfluous to examine the issue of independence. The finding of a (flagrant) violation of the law in the process of appointing a judge should be sufficient. Naturally, one needs to be aware of the possible (massive) consequences of such a concept, but that consideration should not affect the mechanism of verification itself, that is, the logical sequence of steps to be taken and questions to be asked. Should such an assessment lead to significant negative consequences for the system of justice or for the domestic legal order, the adoption of transitional legislation may be the appropriate remedial mechanism. One cannot however reward repeated flagrant violations of national and European law in the name of legal certainty.

# 6. Why has the ECJ confined itself to the independence test?

It is only fair to ask, why the ECJ in its ruling of 19 November 2019, adopted a formula which seems to limit the examination of a "court" to the attribute of independence. It has done so primarily because that is how the preliminary references were formulated by the Supreme Court. This can be reduced to the following wording: *Is the Disciplinary Chamber of the Supreme Court an independent court within the meaning of EU law?* (paras. 51–52) It would have been more accurate to phrase them, or expand them, in the following way: *Is the Disciplinary Chamber a court established by law within the meaning of EU law?* In the judicial dialogue mechanism based on Article 267 TFEU it is for the national court to determine the content of the questions asked. An incomplete ECJ answer, too narrow for the genuine task facing the national court, is, in the first place, due to the scope of the references for a preliminary ruling.

It could be argued that the Court may have perhaps reformulated the questions, as it does frequently, yet extending them to cover the elements not explicitly included by the referring court, could again be challenged, considering that the test of "establishment by law" is a different one from the independence test. Nevertheless, I would argue that the ECJ, when responding to the questions raised, could have supplemented them – or more accurately, "preceded" them, by pointing to the test of establishment by law. Firstly, as has already become a tradition, especially noticeable in cases involving changes in the Polish judiciary, the ECJ offers a more general part in its rulings, a kind of manual of legal standards which are applicable to the appraisal of issues brought before the Court. It did similarly in this ruling as well (see paras. 115 et seq.). It could perhaps have added a paragraph to indicate a more complete test. Secondly, it would only be consistent with the objectives of references for a preliminary ruling made in these cases by the domestic court, to

mention additionally the element of “establishment by law”. The intention of the requesting court was to make an assessment of the lawfulness of a judicial body. And that includes the establishment test. Ultimately, the content of the ECJ’s replies was thus fully valid, yet not sufficient.

The ECJ will still have an opportunity to come back to these issues, for example, in cases C-487/19 *W.#.* and C-508/19 *Prokurator Krajowy*, in which the Supreme Court does formulate the preliminary references to the ECJ in the “establishment test” language. In those references the Supreme Court itself pointed to the criterion of a “flagrant violation of domestic law” as the one suggested for carrying out the test. Therefore, anticipating the ECJ’s response, which should not be different from the position of the European Court of Human Rights, the Supreme Court could incorporate this test into its reasoning.

# 7. Conclusions

There are essentially three ways to improve the ECJ’s test of verification of a court and structure it correctly according to the model indicated above. First, the Supreme Court may adjust the test itself by supplementing it with a stage preceding the test described in the ruling of 19 November 2019. It should be emphasized that such a method is absolutely appropriate, it is permissible on the basis of the ECJ judgment and ensures full respect for it. There is nothing in the ECJ ruling that would prohibit or hinder the addition of a logically preceding stage. Secondly, it is possible to wait for the ECJ to reply to subsequent references for a preliminary ruling in which the questions have already been formulated from the perspective of examining the establishment of the court. It is unlikely that the Court in Luxembourg would here depart from the case-law of the European Court of Human Rights with regard to a court established by law. Thirdly, a party to a domestic proceeding which does not agree with the finding, based solely on the independence test, that the body which adjudicated the case was a “court”, is still authorized to lodge an individual complaint with the Strasbourg Court alleging a violation of Article 6 (1) ECHR.

The most appropriate way appears to be the first option. It enables to settle the issue on the lowest possible level, that is, the domestic one, unless this proves impossible due to non-legal reasons. The second and particularly the third option imply a significant elapse of time and a prolonged situation of legal uncertainty.